

1 regional sports networks and broadcast
2 stations. I have analyzed those
3 econometrically before.

4 Q Have you done it in this case --

5 A There is no --

6 Q -- for these networks?

7 A There is not a natural -- there is
8 not a direct natural experiment for which I
9 had data to do that during the course of this.

10 Q Okay. Is it fair to say, then,
11 that you have no opinion as an economic expert
12 as to how Comcast views these networks?

13 A I have not done that analysis, no.

14 Q Okay. Anything else? We have
15 advertising content --

16 A I think you --

17 Q -- how the carriers view the
18 channels.

19 A I think those are the three
20 primary markets. There may be some tiny other
21 aspects, but those -- you have hit the vast
22 majority of where they -- where they could

1 compete.

2 Q Okay. But in terms of my initial
3 question to you about whether these three
4 channels are similarly situated, you have no
5 opinion about that, because in your opinion
6 that requires a legal opinion, which you are
7 not cable of rendering.

8 A Precisely.

9 Q Okay. Just a few more questions.
10 Let me turn your direction -- your attention
11 to your direct written testimony, which is
12 Comcast Exhibit 24.

13 A Sure.

14 Q And let's look first at
15 paragraph 17. Actually, let's look first at
16 paragraph 16. Why don't you take a moment to
17 just refamiliarize yourself with that.

18 A Yes.

19 Q And let's focus first on the first
20 sentence that Comcast does not have the
21 incentive to restrain the NFL's ability to
22 compete.

1 A Do you want me to read that or --

2 Q No, that's --

3 A Okay.

4 Q Yes, please.

5 A I'm focused on -- to compete
6 because there is no valid basis for concluding
7 that such a restraint would benefit its
8 affiliated sports networks, the Golf Channel
9 and Versus.

10 Q What do you mean by that?

11 A What I mean is let's go back to
12 the advertising market example. If Comcast
13 reduces carriage of the NFL Network, and, as
14 a result, some advertisers -- and this is a
15 hypothetical -- some advertisers decide to
16 leave. It is such a competitive marketplace
17 that there is going to be -- they can go to
18 any of the 25, give or take, national sports
19 channels.

20 So the benefit that Comcast would
21 receive -- would receive at its channels,
22 assuming this all were the case, would be so

1 small that it wouldn't justify the potential

2 -- wouldn't justify the actual.

3 Q Now, you talk about Comcast not
4 having the incentive to restrain the NFL's
5 ability to compete. Is that different than
6 any potential capacity that Comcast might have
7 to restrain competition?

8 A Yes. Often what economists like
9 to think about when they get -- when we are
10 doing an antitrust analysis like this is both
11 the ability and incentive.

12 Q Okay.

13 A And so I discuss in here late --
14 much later on the ability of the NFL Network
15 to reach their [REDACTED] non-Comcast MVPD
16 subscribers. And there is nothing that
17 Comcast has done that would inhibit the
18 ability of the NFL Network to go after and get
19 those [REDACTED] non-Comcast MVPD subscribers.
20 So I discuss in the document the ability
21 issue, and then this is the incentive.

22 Q Now, you just said that there is

1 nothing that Comcast has done. But Comcast is
2 the biggest cable operator in the country,
3 correct?

4 A That is correct.

5 Q It is essentially -- would it be
6 fair to say it's a bottleneck in terms of
7 delivering programming to the public?

8 A No, I would not agree to that.

9 Q It's not a bottleneck?

10 A No, because a programmer -- as you
11 may be aware, the FCC has discussed issues of
12 minimum viable scale, how many subscribers do
13 you need to get to have a viable network.
14 And, on average, they have said it's 19
15 million in various reports.

16 So if Comcast said, "Absolutely
17 not, doesn't matter what price you give it --
18 offer it to us, we won't take it," for
19 whatever reason they just said, "We're not
20 going to take it," that programmer still has
21 the opportunity to obtain [REDACTED] MVPD
22 subscribers, which is more than enough to be

1 a viable network.

2 Q Because there are other sources
3 where programming --

4 A Precisely. So they can go to the
5 Charters and the Cablevisions and the Time
6 Warners and DirecTV and EchoStar, and AT&T now
7 and Verizon. So they have lots of potential
8 options of who to sell their programming to.

9 Q So in your professional opinion,
10 Comcast does not even have the ability to
11 restrain the NFL's ability to compete?

12 A On a national basis. They don't
13 have the ability to foreclose them from
14 reaching those [REDACTED] subscribers. I'm
15 focusing on the national market, because
16 programming is delivered nationally.

17 Q All right.

18 JUDGE SIPPEL: How many customers?
19 How many subscribers?

20 THE WITNESS: There are roughly
21 [REDACTED] MVPD subscribers
22 nationwide. Comcast serves roughly [REDACTED]

1 [REDACTED], so that leaves [REDACTED] subscribers
2 that the NFL Network can sell its programming
3 to, and --

4 JUDGE SIPPEL: Okay. So Comcast
5 can't foreclose the NFL because of -- well,
6 never mind why, but it -- can it foreclose any
7 other competitor?

8 THE WITNESS: What do you mean by
9 "competitor"?

10 JUDGE SIPPEL: Well, you said the
11 NFL is a competitor.

12 THE WITNESS: Well, let me try it
13 this way, that any cable programming network,
14 the network, the upstream entity, has the
15 opportunity to sell to -- if they can't get
16 carriage on Comcast for whatever reason, they
17 still have [REDACTED] subscribers to go after.

18 BY MR. SCHONMAN:

19 Q Does Comcast have -- in your
20 professional opinion, does Comcast have the
21 ability to restrain the NFL's ability to
22 compete on a regional level?

1 A The regional question is much
2 trickier, and the question is Comcast as a
3 programmer or Comcast as a distributor. And
4 I haven't analyzed Comcast's market share in
5 a long time in each particular market, but
6 that is a much more viable theory of harm on
7 a regional basis. But it is not one that I
8 have analyzed in this case. I have analyzed
9 it previously, though.

10 Q So you have no opinion as to
11 whether Comcast has the ability to restrain
12 the NFL's ability to compete on a regional
13 level?

14 A Well, the programming is not sold
15 on a regional level. It is sold nationally.
16 So the -- if, for example, Comcast says, "We
17 are not going to carry it at any price. It
18 doesn't matter; we are not going to carry it,"
19 the NFL Network still has the opportunity to
20 sell the programming throughout the country.
21 DirectTV is available everywhere. The Dish
22 Network is available everywhere.

1 So a national network can get its
2 -- in some sense it doesn't care if the
3 subscriber comes from San Francisco or New
4 York or Boston or Los Angeles. It wants those
5 subscribers, and that is what drives the
6 revenue, because there is license fees paid.
7 So they have an opportunity to get subscribers
8 from anywhere.

9 Q That's how the NFL would view it.
10 For the viewer in a particular market who
11 can't get it, it is a big problem for that
12 person.

13 A Potentially it is, but that is not
14 -- that doesn't harm the NFL's ability to
15 compete on a nationwide basis. That is a --
16 that then goes into, in essence, a welfare
17 calculation, because there are a number of
18 different pros and cons that one would have to
19 evaluate.

20 Q Is there any reason why we should
21 restrict our analysis to the national level as
22 opposed to any other level that there may be?

1 I mentioned regional. There could be market
2 by market.

3 A Well, because programming is sold
4 on a national basis, that is then the relevant
5 market to consider. There is no -- from an
6 antitrust perspective, they are not able to
7 price discriminate the programming based on
8 the market. They are selling it on a national
9 basis, period. And so then it's a national
10 market.

11 Q Okay. When Dr. Singer testified,
12 you were here for that?

13 A Yes, I was.

14 Q You are going to have to help me
15 out here, because my recollection is not so
16 good. But I recall I think him saying that it
17 is bedrock economic theory that maximizing
18 profits is the goal of every business.

19 A Correct.

20 Q And that there are times, I
21 believe he said, that an entity may not want
22 to reduce the price in order to clear the

1 inventory, that there may be some threshold
2 level where they -- below which they don't
3 want to go.

4 A Precisely.

5 Q Do you agree with that?

6 A I do agree with that.

7 Q Take a look at paragraph 17.

8 A Yes.

9 Q In the first sentence you say --
10 well, it looks like you are agreeing with Dr.
11 Singer there.

12 A I do agree with him on that point.

13 Q "There is no reason why the NFL
14 Network could not obtain broader distribution
15 by offering Comcast or any other cable company
16 a lower license fee or better carriage terms."
17 Are you saying that -- well, what are you
18 saying there?

19 A What I'm saying is that the claim
20 in this case is very much -- well, we need
21 higher distribution. We need more
22 distribution. And if they want more

1 distribution, the way they can get more
2 distribution is just by lowering our price and
3 getting more -- a higher penetration rate.

4 The fact that they have decided to
5 set the price at a high level, which produces
6 a low distribution amount that we observed
7 many of the large cable companies not taking
8 the programming, does not mean that Comcast is
9 in any way discriminating, because they are
10 taking price into account. They are saying
11 that the programming is too expensive for what
12 it offers.

13 And so this is entirely consistent
14 with economic theory that what they are doing
15 is they have set the price high, they have low
16 distribution, and if they wanted more
17 distribution they can just lower the price and
18 that will increase their distribution level.

19 Q But aren't there times under this
20 bedrock economic theory that an entity might
21 not want to do that?

22 A Precisely. That is absolutely

1 correct.

2 Q But you are saying here there is
3 no reason why they wouldn't want to reduce
4 their price. But isn't the reason why because
5 it is a bedrock policy?

6 A Well --

7 Q Or theory?

8 A -- let me try to -- the answer is
9 I -- I focused on "could not obtain broader
10 distribution." So if the goal is to get
11 broader distribution, that -- they can lower
12 the price. That may be -- that may make them
13 somewhat less profitable, but they would still
14 be very profitable.

15 The fact that -- the other way to
16 put it is, if we go back to the crab example
17 --

18 Q Sure.

19 A -- if you don't mind, because it
20 has become the example for the case -- is if
21 10 crabs -- 10 bushels of crabs come in, and
22 the person decides -- the seller decides that

1 the optimal thing is to try to sell only two
2 bushels, restrict output, sell two bushels at
3 a very high price, and just let the other
4 eight perish, that is their own decision.
5 That is within their own power.

6 But by setting the high price, if
7 the third -- somebody walks in and says, "You
8 know what? Your price is \$100. That's too
9 expensive. I want you -- I only am willing to
10 pay \$80," it is not discrimination that they
11 say, "That price is too expensive, the \$100
12 price, because I am only willing to pay \$80."

13 If, then, the fish seller, the
14 crab seller, says, "You know what? I am
15 happier just setting a price high and only
16 selling two," that is their choice. But if
17 they want to have broader distribution -- that
18 is, sell more bushels -- they then need to
19 bring down the price to reflect the demand for
20 the product. Does that make sense?

21 Q It takes some time to sink in, but
22 we'll --

1 A Okay.

2 Q -- we'll leave it at that.

3 MR. SCHONMAN: I have no further
4 questions, Your Honor.

5 JUDGE SIPPEL: Let me just --
6 before you get to it, Mr. Schmidt, ask --

7 MR. TOSCANO: I don't have
8 anything on that.

9 JUDGE SIPPEL: You don't have any?

10 MR. TOSCANO: Not based on that.
11 I may have some redirect.

12 JUDGE SIPPEL: Oh, I'm sorry.
13 You --

14 MR. TOSCANO: Would you like to go
15 first?

16 JUDGE SIPPEL: Yes. It'll make it
17 easier for you. There's a couple of things I
18 want to clear up.

19 FiOS -- Verizon, rather, and the
20 AT&T, they are relatively new competitors on
21 the block.

22 THE WITNESS: Yes.

1 JUDGE SIPPEL: How do they fit
2 into the scheme of this? I mean, is anything
3 like MLB or NFL or, you know, any of these
4 very valuable sports programs, have they --
5 networks, have they ever, you know -- any
6 evidence that they have tried to -- I mean, do
7 they -- is there a measure for that? Do you
8 -- do they enter into the equation? Let me
9 put it that way.

10 THE WITNESS: Well, AT&T and
11 Verizon, the way I would put it is they give
12 another venue, another outlet for programmers
13 to sell their product. And so that makes the
14 whole market more competitive. There is more
15 competitive options. And that competition
16 accrues to the benefit of consumers.
17 Consumers want -- the more competition there
18 is, the lower the price is, and consumers want
19 low prices.

20 JUDGE SIPPEL: So do they -- I'm
21 sorry to cut you off there, but are they
22 competing with Comcast for NFL broadcasts? I

1 mean, are --

2 THE WITNESS: No, because -- they
3 don't, because when you -- I will use the
4 economist word. Economists call the NFL
5 Network "non-rivalrous." That is, the fact
6 that the NFL Network sells its product to AT&T
7 doesn't mean -- it can also turn around --
8 there is no marginal cost. It can actually
9 literally just flip the switch and it can sell
10 it to Verizon, and it can flip a switch and
11 then sell it to Comcast.

12 So one of the things Dr. Singer
13 and I agree on -- and a couple of times I
14 think I mentioned our agreement in here where
15 I mention his name, is precisely because the
16 marginal cost of supplying cable programming
17 is zero. And so they can provide it for
18 effectively the same cost to every MVPD out
19 there.

20 JUDGE SIPPEL: Wouldn't there be
21 an incentive to want to do that?

22 THE WITNESS: Again, it goes back

1 to the question that their incentive -- the --
2 let me try it this way. The economically
3 efficient thing to do would be to provide the
4 programming at the lowest cost possible to the
5 most number of people. But the profit
6 maximization of the firm, the NFL Network in
7 this case, or Versus and Golf, may be to
8 restrict output and to sell the product to
9 fewer people at a higher price.

10 And it will all depend on the
11 shape of their demand curve -- is the
12 relationship between distribution and the
13 license fee. And so it may be that if the NFL
14 Network lowered price by 10 pennies, by 10
15 cents, it would get a lot more distribution.
16 It may be that it would have to lower price a
17 lot more to get a lot -- a significant amount
18 of distribution.

19 JUDGE SIPPEL: But you said -- or
20 I think we are dealing with -- the scenario
21 here is that there is about [REDACTED]
22 potential subscribers out there somewhere in

1 the -- in this big country of ours. And, you
2 know, if there is a couple more big -- I mean,
3 it seems -- I don't know. I -- whether this
4 new kind of technology and what not coming
5 with AT&T and Verizon that you would be able
6 to have a better chance of reaching all of
7 those.

8 THE WITNESS: Precisely.

9 JUDGE SIPPEL: In conjunction
10 with, you know, the other outlets.

11 THE WITNESS: That is actually one
12 of the reasons why -- and I am sure Mr.
13 Toscano will ask me on my redirect -- that
14 paper that they cited from 2002 of mine isn't
15 applicable here because of the change in
16 competition, the entry of the AT&Ts and the
17 Verizons of the world, and how much more
18 competitive they have made the market.

19 JUDGE SIPPEL: Even if they are
20 not -- you say they are not -- what is that
21 term that you used, they are not -- you had a
22 word of art that you said --

1 THE WITNESS: Not.

2 JUDGE SIPPEL: -- that they are
3 not --

4 THE WITNESS: They are two
5 different issues, so let me try -- I used the
6 word "non-rivalrous."

7 JUDGE SIPPEL: They are non-
8 rivalrous. Okay.

9 THE WITNESS: That has to do with
10 the programming. So let's -- again, we are at
11 the sort of upper tier. The programming of
12 the NFL Network is non-rivalrous.

13 JUDGE SIPPEL: I remember that,
14 yes.

15 THE WITNESS: That is the sense
16 that they can sell it to everybody.

17 JUDGE SIPPEL: The marginal cost
18 is not going to change.

19 THE WITNESS: The way to think
20 about it is if we go back to crabs, that is a
21 rivalrous good. If you sell one bushel of
22 crabs to you, you can't sell it to me. But if

1 you sell the NFL Network to you, you can also
2 sell it to me.

3 JUDGE SIPPEL: Right.

4 THE WITNESS: And so that's what
5 economists would call non-rivalrous.

6 JUDGE SIPPEL: Well, aren't they
7 at least -- I'm probably not -- I'm probably
8 shifting gears here on you. But aren't they
9 at least -- they are at least -- even if they
10 are not actually -- when I say "they," I mean
11 the Verizons and the AT&Ts, they are not
12 actually out there beating the bushes for the
13 business right now, but they certainly are
14 potentially an excellent resource, given the
15 right market circumstances and everything,
16 which would put --

17 THE WITNESS: They're actually
18 beating the bushes pretty hard.

19 JUDGE SIPPEL: Well --

20 THE WITNESS: They have grown much
21 more quickly than I think just about any MVPD
22 in history. I mean, it is really -- the

1 growth that they have had is really shocking.
2 The Department of Justice recently released a
3 report on this, and the report shows that the
4 increase in competition is quite significant
5 from the telephone companies.

6 JUDGE SIPPEL: I say no more about
7 that.

8 The other question I had is that
9 you -- your company or your -- whatever the
10 organization is that you are working for, did
11 they enter into an agreement, a retainer
12 agreement of some sort with Comcast?

13 THE WITNESS: We probably don't
14 have a signed agreement, because we do most of
15 our work without signed agreements. But we
16 bill by the hour, like --

17 JUDGE SIPPEL: I'm not into that.
18 What was the -- yes, but what have you been
19 retained to do? Have you been retained to
20 meet Dr. Singer's opinions, or have you been
21 made to do something beyond that?

22 THE WITNESS: Well --

1 JUDGE SIPPEL: I say "meet." I
2 mean, it could be anything from undercutting
3 it to --

4 THE WITNESS: Yes. And some
5 history may help here, because this started --
6 somebody may know the precise date -- I
7 believe about a year ago, maybe 10 months ago
8 now.

9 Initially, there was a complaint
10 filed, and I filed a declaration. The sole
11 purpose of -- or large purpose was to rebut
12 the claims made by Dr. Singer.

13 JUDGE SIPPEL: Was that at the FCC
14 or in New York?

15 THE WITNESS: That was at the FCC.
16 And then, it's -- this case has morphed in
17 ways that I am not going to try to understand,
18 to be honest. And so both make an affirmative
19 -- in this one, we both analyze the issues
20 affirmatively and also rebut Dr. Singer's
21 claims. And, as I discuss in here, the most
22 direct and compelling evidence is the fact

1 that the non-vertically integrated cable
2 companies have decided not to carry the NFL
3 Network.

4 JUDGE SIPPEL: The non-vertically
5 integrateds have decided not to carry the NFL
6 programming. All right. I will just -- I
7 will stop it at that. But what conclusions --
8 what, really, are the bottom-line conclusions
9 that you come up with? I think you might have
10 stated them before, but I would like to hear
11 them again in light of everything I've heard
12 today.

13 THE WITNESS: Okay. So I think
14 the first primary conclusion is that if one
15 looks at the non-vertically integrated cable
16 companies -- and we are assuming profit
17 maximization, both Dr. Singer and myself --
18 that they have acted to maximize their profits
19 by saying, "The price of the NFL Network or
20 the carriage demands are too high and we won't
21 carry it."

22 So if one considers Comcast as

1 just a cable company, they are behaving very
2 similarly to these other non -- to these non-
3 vertically integrated companies. So one
4 cannot on that basis say that Comcast has made
5 the decision to tier them, because of the
6 benefits it receives as a vertically
7 integrated cable company.

8 That is, it is acting exactly like
9 it is not vertically integrated, because it is
10 -- the behavior is very similar to what those
11 non-vertically integrated cable companies are
12 doing. That is number one.

13 Number two is I discuss -- as we
14 did in the --

15 JUDGE SIPPEL: Are these in order
16 of importance, by the way?

17 THE WITNESS: Yes, I would say so.

18 Number two is that one cannot just
19 look at ratings and say that the NFL Network
20 should have a higher price, because the
21 ratings -- there is no direct correlation
22 between ratings and license fees.